Supreme Court, U.S.
FILED
JUL 28 1970
CLERK

In the Supreme Court of the United States

No. 341.

OCTOBER TERM, 1970.

LAKEWOOD MANUFACTURING COMPANY,

Petitioner,

vs.

THE HOME INSURANCE COMPANY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

JEROME N. CURTIS,
MARVIN L. KARP,
1100 Keith Building,
Cleveland, Ohio 44115,

JOHN P. GORMAN,
135 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions Below . . . 1

Statement of the Case . . . 1

Argument . . . 5

I. The Court of Appeals Applied the Correct Rule of Law in Upholding the Appraisal Award . . . 5

II. The Appraisal Award Did Not Alter the Policy Coverage . . . 14

III. The Court of Appeals Properly Determined That the Decision of the District Court Was Clearly Erroneous . . . 16

Conclusion . . . 18

TABLE OF AUTHORITIES.

Cases.

Aetna Casualty & Surety Co. v. American Surety Co., 64 F.(2d) 577 (C.A. 4, 1933) . . . 17

Baltimore & Ohio Railroad Company v. Stankard, 56 Ohio St. 224, 46 N.E. 577 (1897) . . . 6

Bates v. Pennsylvania Rd. Co., 26 Ohio L. Abs. 114, 33 N.E. (2d) 678 (App. 1937) . . . 13

Erie Brewing Company v. Ohio Farmers Insurance Company, 81 Ohio St. 1, 89 N.E. 1065 (1909) . . . 10

Fire Association of Philadelphia v. Agresta, 115 Ohio St. 426, 154 N.E. 723 (1926) . . . 10

Hamilton v. Insurance Co., 136 U.S. 242 (1890) . . . 6

Igor Bros. v. National Ben Franklin Fire Insurance Co., 110 N. J. Eq. 373, 160 A. 382 (1932) . . . 16

Mullen v. Mullen, 11 Ohio N.P. (N.S.) 353, 21 Ohio Dec. 356 (1911) . . . 9-10

Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co., 360 F.(2d) 531 (C.A. 8, 1966) . . . 15

Patriotic Order Sons of America Hall Association v. Hartford Fire Insurance Co., 305 Pa. 107, 157 A. 259, 78 A.L.R. 899 (1931) 12

Phoenix Insurance Co. v. Everfresh Food Co., 294 F. 51 (C.A. 8, 1923) 13

Pfleger v. Renner, 13 Ohio App. 96 (1920) 16

Rademaker v. Atlas Assurance Co., Ltd., 98 Ohio App. 15, 120 N.E. (2d) 592 (1954) 11

Rogers v. American Insurance Co., 338 F.(2d) 240 (C.A. 8, 1964) 14

Royal Insurance Company v. Ries, 80 Ohio St. 272, 88 N.E. 638 (1909) 7, 8, 10

Schreiber v. Pacific Coast Fire Insurance Co., 195 Md. 639, 75 A.2d 108, 20 A.L.R. (2d) 951 (1950) 9

State of California v. United States, 119 F. Supp. 174 (Ct. Cl., 1954) 10

United States v. United States Gypsum Co., 333 U.S. 369, 68 S. Ct. 525, 92 L. Ed. 746 (1948) 17

Waters, In Re, 93 F.(2d) 196 (C.A. 5, 1937) 7

Texts.

5 AM. JUR. (2d) 520, 521, *Arbitration and Award*, § 3 (1962) 6, 9

29 AM. JUR. 934, *Insurance*, § 1251 11

44 AM. JUR. (2d) 631, *Insurance*, § 1719 ..... 7, 11

5 C.J. 179 13

45 C.J.S. 1370-1371, *Insurance*, § 1127 (1946) 13, 16

14 COUCH ON INSURANCE (2d) 469, § 50: 228 (1965) 10

14 COUCH ON INSURANCE (2d) 481, § 50: 252 (1965) 13

30 OHIO JUR. (2d) 674, *Insurance*, § 734 11

Rules.

Rule 52(a) Fed. R. Civ. P. 17

In the Supreme Court of the United States

No. 341.

OCTOBER TERM, 1970.

LAKEWOOD MANUFACTURING COMPANY,

Petitioner,

vs.

THE HOME INSURANCE COMPANY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio pertinent to the petition for writ of certiorari is printed at pp. 68-79 of the Appendix attached to the said petition. The opinion of the Court of Appeals for the Sixth Circuit is reported at 422 F. (2d) 796 (1970).

STATEMENT OF THE CASE.

Petitioner is the insured under some twelve insurance policies which insured it "only against loss resulting directly from necessary interruption of business caused by damage to or destruction of real property, except finished stock, by the peril(s) insured against" (i.e., fire, windstorm, explosion, etc.) "for only such length of time as

would be required with the exercise of due diligence and dispatch to rebuild, repair or replace" the damaged property.

On October 3, 1961, a fire occurred in a limited portion of petitioner's connected buildings in Westlake, Ohio. Despite the fire, petitioner continued to manufacture at a high rate of production until January 9, 1962, when a strike occurred at the plant of its primary customer, The Brunswick Corporation. As a result of the strike, petitioner was unable to ship goods to Brunswick or to receive payments for the goods it would be producing. Accordingly, petitioner drastically curtailed its production, cutting back to a three-day work week (R. 872). When the strike ended, on April 6, 1962, petitioner resumed full production.

Differences thereafter arose between petitioner and its insurers, respondents herein, as to the amount of the business interruption loss suffered by petitioner as a result of the fire, respondents being of the view that most of petitioner's claimed $527,000 business interruption loss (R. 573) was caused by the strike at Brunswick and not by the fire.

In March, 1963, this dispute was submitted to appraisal in accordance with express provisions contained in each of the policies of insurance.[1] On September 25, 1964,

---

[1] "In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, fail-

(Continued on following page)

after more than a year of independent investigation, study and analysis, the umpire and one of the two appraisers concluded that, although "the period from October 3, 1961 to May 2, 1962 was a reasonable time in which to rebuild the building and to move and relocate the machinery and equipment which had to be reconstructed and replaced on account of the fire on October 3, 1961," any business interruption loss after January 9, 1962 was due to the strike at Brunswick and not to the fire (A. 72). The umpire and concurring appraiser therefore determined that the actual cash value of the business interruption loss caused by the fire, namely, that loss which occurred in the period from October 3, 1961 to January 9, 1962, was $152,177.11, plus $30,996 in agreed "expediting expenses."

In the meantime, on April 10, 1963, petitioner had filed separate suits on the twelve business interruption insurance policies issued by respondents for the total sum of $850,000. After the appraisal award was rendered, respondents pleaded that that award determined the total amount of petitioners' business interruption loss. Petitioner replied that the award was invalid.[2]

The issues raised by petitioner with respect to the validity of the appraisal award were tried separately by the District Court. At the trial, both the umpire and the concurring appraiser testified *without contradiction* that

---

(Continued from preceding page)

ing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

[2] The basis of the claim of invalidity was that the award was based on mistakes in fact and mistakes in law, mistakes in mathematics, mistakes in accounting, and that the award in general failed to determine the actual loss sustained by plaintiff.

the amount of their award was based on their determination that petitioner had sustained no actual business interruption loss *as a result of the fire* after January 9, 1962 (R. 288-289, 582, 601). The District Court, however, while conceding that "the award represents a sincere and honest effort by the umpire to mediate the dispute between the parties as presented to him by the appraisers" (A. 77), completely overlooked this testimony and proceeded to *deduce* the umpire's intent solely on the basis of *inferences* drawn from the expository language of the award. Thus, the District Court concluded that:

> "*By reason of the fact that the only expressed time period found by the umpire was the reasonable rebuilding period*, it is the Court's conclusion that the award must be construed as finding a period of business interruption as a result of the fire extending from October 3, 1961 to May 2, 1962, subject to the fact that the strike at Brunswick had to be considered in determining plaintiff's actual loss sustained." (A. 76) (Emphasis added.)

The District Court then proceeded to hold that the umpire and concurring appraiser had "failed to determine" what loss petitioner had sustained during the final four months of the seven-month "period of business interruption" that the Court had "construed," and that the appraisal award was therefore invalid.

On appeal, following a further trial in which the District Court determined that the amount of petitioner's business interruption loss as a result of the fire was $277,787, the Court of Appeals for the Sixth Circuit held that the District Court's construction of the appraisal award was clearly erroneous, and that the District Court therefore erred in setting it aside.

ARGUMENT.

In an effort to persuade this Court to grant a writ of certiorari, petitioner makes the astonishing assertion that the decision of the Court of Appeals for the Sixth Circuit, upholding the validity of the appraisal award, "has developed utter chaos." In fact, the decision of the Court of Appeals is squarely in accord with settled rules of law adhered to by the courts of Ohio, and of virtually every other jurisdiction, for almost a century. Therefore, anything akin to "chaos" would result *only if petitioner were to prevail* in its efforts to upset that decision.

I. THE COURT OF APPEALS APPLIED THE CORRECT RULE OF LAW IN UPHOLDING THE APPRAISAL AWARD.

The Court of Appeals stated the controlling rules of law in appraisal award cases to be as follows:

> "Generally, a court will not interfere with an appraisal award but, to the contrary, will indulge in every reasonable presumption to sustain it in the absence of fraud, mistake, or misfeasance. A court will not substitute its judgment for that of the appraisers or set aside an award for inadequacy or excessiveness unless it is so palpably wrong as to indicate corruption or bias on the part of the appraisers. 44 Am. Jur. 2d *Insurance* § 1719 (1969).
>
> "The law of Ohio, applicable here, is essentially in line with the general rule. In Ohio, fraud or manifest mistake is a proper legal basis upon which to set aside an appraisal award. *Baltimore & Ohio RR v. Stankard,* 56 Ohio St. 224 (1897). To constitute manifest mistake, the mistake must be of such character that the arbitrator or appraiser would have corrected it had it been called to his attention; a mistake of judgment is not manifest mistake. *Pfleger v. Renner,* 13 Ohio App. 96 (1920). See *Bates v. Pennsyl-*

vania RR., 26 Ohio L. Abs. 114 (App. 1937)." (422 F. (2d) at 798.)

The basic thrust of petitioner's argument is that the rule cited by the Court of Appeals, *viz.*, that an award may be set aside only on the grounds of fraud or manifest mistake, applies solely to arbitrations, whereas appraisals may be set aside for mistakes of any kind, including errors in judgments.

This argument is wholly fallacious. It is abundantly clear from the Ohio cases that the rule cited by the Court of Appeals is applicable to *both* appraisal awards and arbitration awards. The Supreme Court of Ohio, in *Baltimore & Ohio Railroad Company v. Stankard*, 56 Ohio St. 224, 232, 46 N.E. 577 (1897), specifically stated that, where a contract provides that

> "the amount of loss sustained * * * shall be determined by a certain person named in the contract, such fact when ascertained and fixed by the person, and in the manner provided by the terms of the contract, is conclusive between the parties, in the absence of fraud or *manifest mistake* * * *." (Emphasis added.)

That the Supreme Court was here speaking about an *appraisal*, as distinguished from an arbitration, is clear not only from the fact that the type of agreement it desoribed fits precisely the accepted definition of an appraisal (namely, "*the resolution of the specific issues of actual cash value and the amount of loss*," [5 AM. JUR. (2d) 520, *Arbitration and Award*, § 3 (1962)]) as distinguished from an arbitration (which "ordinarily encompasses the disposition of the entire controversy between the parties" [*Ibid.*]), but also from the fact that one of the cases cited by the Supreme Court as illustrating the type of contract it was referring to—*Hamilton v. Insurance Co.*, 136 U.S. 242 (1890)—involved an insurance appraisal

provision very similar to that which is at issue in the instant case.[3]

Hence, there can be no question but that the rule of manifest mistake applies to appraisals as well as to arbitrations. Indeed, this conclusion is so self-evident that *petitioner itself*, in the Brief it submitted at the conclusion of the trial on the validity of the appraisal award, specifically represented to the District Court that:

> "The determinative issue, then, is whether Umpire Yoder was *manifestly mistaken* in the findings he detailed in his award." (Plaintiff's Trial Brief, p. 8, filed February 13, 1967.)

In an effort to obtain a writ of certiorari, petitioner now repudiates the very rule which it urged on the District Court.

In support of its novel proposition that appraisals can be set aside for mistakes other than "manifest mistakes" (that is to say, mistakes of such a character that the arbitrator or appraiser would have corrected them had they been called to his attention) plaintiff relies on three propositions: (1) a truncated statement from the second syllabus of *Royal Insurance Company v. Ries*, 80 Ohio St. 272, 88 N.E. 638 (1909), that an insurance appraisal "is not to be judged by the strict rules applicable to arbitration and awards"; (2) the assertion that appraisal awards have "never been considered binding" (Brief of Petitioner, p. 7); and (3) the fact that certain authorities *outside of Ohio*, including 44 AM. JUR. (2d) 631, *Insurance*, § 1719, and *In Re Waters*, 93 F.(2d) 196 (C.A. 5, 1937), do not use the adjective "manifest" when they state that an

---

[3] The appraisal provision in the instant case, of course, itself fits the description set forth in the *Stankard* case, for it provides that if there is a disagreement "as to the actual cash value or the amount of loss," then the parties may appoint appraisers who "shall determine the amount of actual cash value and loss."

appraisal award may be vacated for "fraud or mistake or misfeasance of the appraisers."

When, however, these propositions are analyzed, it quickly becomes evident that (1) and (3) have been completely misconstrued by petitioner while (2) is absolutely untrue.

Thus, by quoting only a tiny portion of the *Ries* case syllabus, petitioner totally distorts the meaning of the Ohio Supreme Court's reference to "the strict rules of arbitration and award." The *entire* second syllabus in that case reads as follows:

> "2. The provision in a standard fire insurance policy that 'In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally all expenses of the appraiser and umpire,' is a provision for an appraisement and not for an arbitration, and such submission is not to be judged by the strict rules applicable to arbitration and award, and *where the appraisers and umpire have before them a list of the property destroyed, and the insured's statement in detail in respect to his loss, it is not ground for setting aside the appraisement that they refuse to hear evidence.*" (Emphasis added.)

The omission from petitioner's Brief of the italicized language is a most significant one. These latter words, to-

gether with the full text of the Supreme Court's opinion, clearly demonstrate that the "strict rules" that the Supreme Court was referring to were the rules of "*strict judicial investigation*" applicable to arbitrations (80 Ohio St. at 285), such as the requirements for holding formal hearings and adjudging the matters to be decided solely on the basis of evidence presented during adversary proceedings (5 AM. JUR. (2) 521, *Arbitration and Award*, § 3), and that the Supreme Court was in no way intimating that an appraisal award may be *set aside more readily* than might an arbitration award. To the contrary, the very holding of the *Ries* case was that an insurance appraisal award could not be voided on account of the refusal of the appraiser and umpire to "hear evidence," a failure that *would* suffice to void an *arbitration* award.

Nor do any courts outside of Ohio support petitioner's suggestion that appraisal awards may be set aside for different or less restrictive grounds than are required to set aside arbitration awards. As was held by the Maryland Court of Appeals in *Schreiber v. Pacific Coast Fire Insurance Co.*, 195 Md. 639, 75 A.2d 108, 20 A.L.R. (2d) 951 (1950), the

> "rule restricting and preventing judicial review of errors of fact or of law in an award of arbitrators is applicable to an appraisal under the usual appraisal clause in a fire policy."

Petitioner's astonishing assertion that insurance appraisals have "never been considered binding" is also completely devoid of any supporting authority. The standard policy specifically provides that the appraisal award "shall *determine* the amount of actual cash value and loss" (emphasis added) and the verb "determine" means "to bring to an end" (*Mullen v. Mullen*, 11 Ohio

N.P. (N.S.) 353, 358, 21 Ohio Dec. 356 (1911)), "to settle a question or controversy" (*State of California v. United States*, 119 F. Supp. 174, 177 (Ct. Cl., 1954)). Accordingly, the authorities have universally held that if an insurance policy

> "provides that in case of a disagreement as to the amount of loss the matter shall be submitted to appraisers, whose 'award shall *determine* the amount of such loss,' and an appraisal is had in conformity with such provisions, the insurer and the insured will both be *bound* by the result."
>
> 14 COUCH ON INSURANCE (2d) 469, § 50:228 (1965) (Emphasis added.)

The Ohio cases enunciating this rule include *Royal Insurance Company v. Ries*, 80 Ohio St. 272, 88 N.E. 638 (1909), holding that where an appraisal is had pursuant to the policy provisions, the amount the insured may recover is limited to the "amount of the loss so determined, and he cannot recover a larger amount unless the appraisement is void or is set aside"; *Fire Association of Philadelphia v. Agresta*, 115 Ohio St. 426, 430, 154 N.E. 723 (1926), stating that an insurance company could utilize the appraisal proceeding provided for in the policy in order to have the loss determined instead of having it determined by a jury or a court; and *Erie Brewing Company v. Ohio Farmers Insurance Company*, 81 Ohio St. 1, 89 N.E. 1065 (1909), holding that a mortgagee of the insured premises which is named in the loss payable clause of the policy is

> "bound by the award of appraisers provided for and required by the terms of the policy in the event of a disagreement between the insured and the insurance company as to the amount of the loss, although the

mortgagee was not a party to and had no notice of the appraisement and award".

The intermediate Court of Appeals decision relied upon by petitioner—*Rademaker v. Atlas Assurance Co., Ltd.*, 98 Ohio App. 15, 120 N.E. (2d) 592 (1954)—in no way contradicts these holdings. That case involved an application filed with a Common Pleas Court, without summons or pleadings, asking the Court to "confirm" an appraisal award and to enter final judgment in the amount thereof. In holding that there was no statutory or common law authority for such a summary proceeding, the Court of Appeals commented that it was not even able to determine the effect of the appraisal award on the parties because the policies of insurance "were not put into evidence" and the record therefore did not disclose "just what the terms of the policies of insurance are with respect" to the appraisal agreement that was entered into by the parties after the loss.

In the instant case, the policy provisions *were* put into evidence, and, as has been discussed above, they conclusively demonstrate that appraisal awards rendered thereunder are binding on the parties.

As for the statement in 44 AM. JUR. (2d) 631, *Insurance*, § 1719, that an appraisal award "will not be vacated unless it clearly appears that it was made without authority or was the result of fraud, mistake, or misfeasance of the appraisers," [4] it is evident that the word "mistake" is being used here in *precisely the same sense* as the Ohio courts use "manifest mistake"—namely, a failure of

---

[4] At page 5 of its Brief, petitioner attributes this quotation to 30 OHIO JUR. (2d) 674, *Insurance*, § 734, thereby suggesting that it is a statement of Ohio case law. In fact, the authors of OHIO JUR. (2d) took this statement directly from 29 AM. JUR. 934, *Insurance*, § 1251, and not from any Ohio case.

the award to speak the intention of the appraisers—and not in the sense of "any error," as claimed by petitioner. Thus, one of the cases that the authors of AM. JUR. (2d) cite in support of this statement is *Patriotic Order Sons of America Hall Association v. Hartford Fire Insurance Co.*, 305 Pa. 107, 157 A. 259, 78 A.L.R. 899 (1931), wherein the Supreme Court of Pennsylvania held that:

> "An award of arbitrators or appraisers, such as is provided for in the policy in this case and in the agreement of submission, cannot be set aside except for actual fraud or deception, or *for a mistake on the part of the appraisers which is not a mere mistake of judgment*.
>
> * * * * *
>
> "The mistakes which will avoid an award are in a very limited class. 'An honest mistake of judgment in the conclusion of arbitrators which does not exceed the bounds of the submission is not, as a general rule, ground of impeachment of the award, whether the alleged mistake is one of fact or of law, or of both. * * * Such errors are among the contingencies which parties assume when they select such tribunals. When it is sought to set aside an award, upon the ground of a mistake committed by arbitrators, it is not sufficient to show that they came to a conclusion of fact erroneously, however clearly it may be demonstrated that the inference drawn by them was wrong. It must be shown that, by some error, they were so misled or deceived that they did not apply the rules which they intended to apply to the decision of the case, so that upon their own theory, a mistake was made which has caused the result to be somewhat different from that which they had reached by their reason and judgment. A contrary course, it is said, would be a substitution of the judgment of a court in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.' 5 C.J. 179." (Emphasis added.)

It should be noted that the first sentence of the above quotation, as well as the paragraph taken from 5 C.J. 179, was quoted with approval and followed by the Ohio Court of Appeals in *Bates v. Pennsylvania Rd. Co.*, 26 Ohio L. Abs. 114, 119, 33 N.E. (2d) 678 (App. 1937).

The leading treatises on insurance law enunciate this same principle of law. Thus, 14 COUCH ON INSURANCE (2d) 481, § 50: 252 (1965) states that

> "the only ground upon which the court is warranted in setting aside an award arrived at deliberately and apparently in good faith, on account of mistake, is the failure of the award to speak the intention of the appraisers."

Accord: 45 C.J.S. 1370-1371, *Insurance*, § 1127 (1946), stating that in order to set aside an appraisal award for "mistake" the

> "mistake must be palpable or gross and such that the award does not speak the intention of the appraisers or arbitrators. A mere mistake of judgment or an honest error in applying the rules of evidence does not constitute a valid reason for setting aside an award."

As for the non-Ohio cases which mention "misfeasance" as a ground for setting aside appraisal or arbitration awards, it is readily apparent that those courts are talking about *misconduct* of the appraisers, or their failure to perform the duties committed to them; they are not talking about inadequate, or "unjust" awards, as petitioner seems to believe. As was held by the Court of Appeals for the Eighth Circuit in *Phoenix Insurance Co. v. Everfresh Food Co.*, 294 F. 51 (C.A. 8, 1923):

> "We are not concerned with the question as to whether the appraisal is more or less than we now think it should have been, or whether it approximates,

> in our judgment, an amount that would have been allowed on a regular trial in court; we are only concerned with whether it was fairly and honestly made, and *expresses the unprejudiced and unbiased opinion and judgment of the appraisers.* When so made a court is without right to set it aside. The record convinces us that there *was no misconduct or misfeasance on the part of the appraisers,* and that the procedure adopted and the appraisement they made violated no right of the appellee." (Emphasis added.)

There was no evidence of "misfeasance" in the instant case. To the contrary, the District Court specifically found that

> "the award represents a sincere and honest effort by the umpire to mediate the dispute between these parties as presented to him by the appraisers." (A. 77.)

II. THE APPRAISAL AWARD DID NOT ALTER THE POLICY COVERAGE.

The contention advanced in the second section of petitioner's Brief is that the appraisal award "altered the express language of coverage of fire insurance contracts." According to petitioner, it was improper for the Court of Appeals to uphold an award that found that the period of actual loss sustained due to business interruption was shorter than the length of time required to rebuild and repair the damaged property.

However, every federal Court of Appeals that has been confronted with this situation has held that such a distinction is proper and in accordance with the policy provisions. Thus, in *Rogers v. American Insurance Co.*, 338 F.(2d) 240 (C.A. 8, 1964), the Court of Appeals held that the "length of time required to rebuild" provision simply imposes a " 'cut-off' date" beyond which

recovery is not permitted. (In other words, any business interruption loss continuing after that date is not recoverable under the policy.) See, also, *Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.(2d) 531 (C.A. 8, 1966), wherein the Court found that the length of time to rebuild was 33 days, but went on to hold that the insured had suffered *no business interruption loss.* Even the District Court in the instant case *conceded* that "the length of actual business interruption caused by an insured peril may be shorter, equal to or larger than the maximum period of liability under the insurance contracts," i.e. "the length of time to rebuild or repair the fire damage" (A. 75). Accordingly, the umpire and concurring appraiser had every right to find, as they did (R. 288-290, 582, 601), that the business interruption loss resulting from the fire ended on January 9, 1962, even though the repairs were not completed until May 2, 1962.

The failure of petitioner to grasp this distinction explains a number of the "errors" it attributes to the appraisal award, such as petitioner's assertion that while it "*actually* produced $1,843,000 during the period of interruption, the appraisal award only allowed a potential production of $1,595,057" (Petition, p. 11; emphasis by petitioner). Petitioner here is comparing apples to oranges, for the $1,843,000 "actual production" figure it cites was Lakewood's actual production for the full *seven-month period* of repairs (October 3, 1961 to May 2, 1962), whereas the $1,595,057 "allowed potential production" figure covers only the *three-month period* of business interruption loss due to the fire.

As for petitioner's attack on the umpire's finding that petitioner would have realized a 10% profit on the product it lost as a result of the fire, petitioner overlooks the

fact that this finding was a *matter of judgment* which cannot be overturned by the Courts. 45 C.J.S. 1370, *Insurance*, § 1127; *Pfleger v. Renner*, 13 Ohio App. 96 (1920). As was held in *Igor Bros. v. National Ben Franklin Fire Insurance Co.*, 110 N. J. Eq. 373, 160 A. 382 (1932):

> "*It was a matter of judgment* whether the fair measure of the profits which the insured lost because of the fire was to be found in the two-year table or in the five-year table or in some other tabulations. *On such matters of judgment the award is conclusive.*" (Emphasis added.)

III. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE DECISION OF THE DISTRICT COURT WAS CLEARLY ERRONEOUS.

As noted earlier in this Brief, the District Court based its decision setting aside the appraisal award on its "conclusion that the award must be construed as finding a period of business interruption as a result of the fire extending from October 3, 1961 to May 2, 1962" (A. 76). This "conclusion," in turn, was grounded solely on "the fact that the only expressed time period found by the umpire was the reasonable rebuilding period," i.e., October 3, 1961 to May 2, 1962 (A. 76).

The Court of Appeals, upon consideration of the entire record, found the District Court's "construction" of the appraisal award to be clearly erroneous, in that it totally ignored the uncontroverted testimony, at the trial, of Umpire Yoder and appraiser Butler that, although they considered the reasonable rebuilding period to be from October 3, 1961, to May 2, 1962, they had concluded that the actual period of business interruption due to the fire was at an end by January 9, 1962 (R. 288-289 and 582, quoted at 422 F. (2d) at 799). The Court of Appeals there-

fore held that the District Court had ignored the rule, laid down in *Aetna Casualty & Surety Co. v. American Surety Co.*, 64 F.(2d) 577 (C.A. 4, 1933), that ambiguities in appraisal awards should be "resolved in light of the testimony of the umpire and appraiser who signed it" (422 F. (2d) at 799).

In the third section of its petition, petitioner attacks this holding on the ground that the Court of Appeals thereby "invaded the province of the trial court and substituted its interpretation of the evidence for that of the trial judge." (Petition, p. 12)

This assertion is totally baseless. Rule 52(a) Fed. R. Civ. P., specifically provides that the findings of a District Court may be set aside if "clearly erroneous," and this Court, in turn, has held that:

> "A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 369, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). (Emphasis added.)

In addition to failing to take cognizance of this controlling rule of law, petitioner's argument also demonstrates a total misunderstanding of the Court of Appeals' decision, as witnessed by its assertion that the Court of Appeals "decided" that "the petitioner's facilities were rehabilitated by the end of December" (Petition, pp. 13-14). The *Court of Appeals* made no such determination. It simply stated that the evidence was overwhelming that *the umpire and appraiser* had determined that "the fire did not impede production after January 9, 1962" (422 F.2d at 800), and that their finding that Lakewood sustained no actual loss due to the fire after that date, which

finding "is implicit in the written award and explicit in their testimony, represents a question of judgment which may not lightly be set aside." (422 F.2d at 799.)

CONCLUSION.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

JEROME N. CURTIS,
JOHN P. GORMAN,
MARVIN L. KARP,
Attorneys for Respondents.

Of Counsel:

ULMER, BERNE, LARONGE, GLICKMAN & CURTIS,
CLAUSEN, HIRSH, MILLER & GORMAN.